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IN THE

Supreme Court of the United States

October Term, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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Appellee in the above entitled case moves to dismiss or affirm on the grounds that the question presented is wholly insubstantial.

As the appellant's jurisdictional statement poses it, the only question presented concerns the constitutionality of New York Penal Law Section 484(i), upheld by a divided Court of Appeals [18 N.Y.2d 268; Appendix to Jurisd. Stmt.]. That question is now utterly without importance or significance because the provision in question is a dead letter. On September 1, 1967, the entire Penal Law of New York will go out of existence, repealed by a revised Penal Law which takes effect on that date.

Section 484(i), repealed with the rest, has not been perpetuated in the new law. And the Legislature of the State of New York has now concluded its session. The subject matter of Section 484(i), the sale and distribution to minors of salacious materials, has been treated in the revised Penal Law in a manner altogether different from the provision questioned by the instant appeal. By a Bill (S. 4412) passed by both houses of the New York Legislature on April 1, 1967, the revised Penal Law was corrected in a number of particulars. Among these was the repeal of prospective Section 235.20, which was a recodification of an earlier provision declared unconstitutional by the New York Court of Appeals in *People* v. *Bookcase*, —— N.Y.2d —— ( ) [see also, *People* v. *Kahan*, 15 N.Y.2d 311 (1965)]. Substituted therefor in the new Penal Law is a re-enactment of the existing 484(h) of the present Penal Law. The New York Court of Appeals, in their opinion in the instant case, noted with mystification the dual provisions in New York law on the same subject, and while the majority upheld §484(i), the entire court appeared to favor the formulation of §484(h).

Accordingly, prosecutions since the *Tannenbaum* decision have been brought, in most instances, under the constitutionally stronger §484(h) and, any new cases initiated before September 1, 1967, are likely to be under §484(h). Section 484(i) will therefore lie dormant, indeed moribund, until its total demise in the very near future.

Under these circumstances, the instant case hardly presents a question of sufficient importance for this Court to hear or determine; it has no importance for New York, and

because of the peculiar framing of the statute, little if any importance for other jurisdictions. For Mr. Tannenbaum, who was sentenced to 30 days and a fine of $100, the case is of minor importance; the fine has been paid and the jail term was suspended.

WHEREFORE, it is respectfully prayed that the appeal be dismissed or the judgment summarily affirmed.

Respectfully submitted,

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District Attorney
New York County

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

Dated: New York, N. Y.
April, 1967